

Appendix No. 1

AUTO STAGE AND TRUCK TRANSPORTATION ACT.

CHAPTER 213, STATUTES 1917, PAGE 330.

(Approved May 10, 1917)

Amended by Ch. 280, Stats. 1919, p. 457; Ch. 840, Stats. 1921, p. 1609
Ch. 310, Stats. 1923, p. 644; Stats. 1925, Ch. 145, p. 297;
Ch. 153, p. 302; Ch. 254, p. 433.

An act providing for the supervision and regulation of the transportation of persons and property for compensation over any public highway by automobiles, jitney busses, auto trucks, stages and auto stages; defining transportation companies and providing for the supervision and regulation thereof by the railroad commission; providing for the enforcement of the provisions of this act and for the punishment of violations thereof; and repealing all acts inconsistent with the provisions of this act.

The people of the State of California do enact as follows:

SECTION 1. (a) The term "corporation," when used in this act, means a corporation, a company, an association or a joint stock association.

(b) The term "person," when used in this act, means an individual, a firm or copartnership.

(c) The term "transportation company," when used in this act, means every corporation or person, their lessees, trustees, receivers or trustees appointed

by any court whatsoever, owning, controlling, operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and county; *provided*, that the term "transportation company," as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses, sightseeing busses or busses engaged solely in the transportation of bona fide pupils attending an institution of learning when such pupils are transported solely between their homes and such institution of learning, or any other carrier which does not come within the term "transportation company" as herein defined.

(d) The term "public highway," when used in this act, means every public street or highway in this state.

(e) The words "between fixed termini or over a regular route," when used in this act, mean the termini or route between or over which any transportation company usually or ordinarily operates any automobile, jitney bus, auto truck, stage or auto stage, even though there may be departures from said termini or route, whether such departures be periodic or irregular. Whether or not any automobile, jitney

bus, auto truck, stage or auto stage is operated by a transportation company "between fixed termini or over a regular route" within the meaning of this act shall be a question of fact and the finding of the railroad commission thereon shall be final and shall not be subject to review. [Amended, Ch. 280, Stats. 1919, p. 457; and Ch. 145, Stats. 1925, p. 297.]

SEC. 2. No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any automobile, jitney bus, auto truck, stage or auto stage for the transportation of persons or property for compensation on any public highway in this state except in accordance with the provisions of this act.

SEC. 3. [Section 3 was repealed by Ch. 280, Stats. 1919, pp. 457, 460.]

SEC. 4. The railroad commission of the State of California is hereby vested with power and authority to supervise and regulate every transportation company in this state; to fix the rates, fares, charges, classifications, rules and regulations of each such transportation company; to regulate the accounts, service and safety of operations of each such transportation company, to require the filing of annual and other reports and of other data by such transportation companies; and to supervise and regulate transportation companies in all other matters affecting the relationship between such companies and the traveling and shipping public. The railroad commission shall have power and authority, by general order

or otherwise, to prescribe rules and regulations applicable to any and all transportation companies. The railroad commission, in the exercise of the jurisdiction conferred upon it by the constitution of this state and by this act, shall have power and authority to make orders and to prescribe rules and regulations affecting transportation companies, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county, and in case of conflict between any such order, rule or regulation and any such ordinance or permit, the order, rule or regulation of the railroad commission shall in each instance prevail.

SEC. 5. No transportation company shall hereafter begin to operate any automobile, jitney bus, auto truck, stage or auto stage for the transportation of persons or property, for compensation, on any public highway in this state without first having obtained from the railroad commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required of any transportation company as to the fixed termini between which or the route over which it is actually operating in good faith at the time this act becomes effective, or for operations exclusively within the limits of an incorporated city, town, or city and county. Any right, privilege, franchise or permit held, owned or obtained by any transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the railroad commission. The railroad commission

shall have power, with or without hearing to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require.

The railroad commission may at any time for a good cause suspend and upon notice to the grantee of any certificate an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this section. [Amended, Ch. 280, Stats. 1919, p. 457.]

Each application for a certificate of public convenience and necessity or for an order authorizing the sale, leasing, assignment or transfer of an existing operative right, privilege, franchise or permit made under the provisions of this section must be accompanied by a fee of fifty dollars; *provided, however*, the movement of products or implements of husbandry and other farm necessities from farm to farm or from and to farm to and from loading point, warehouse or other initial point shall not be subject to the regulations of this act. [Amended by Ch. 310, Stats. of 1923, p. 644.] (Above *proviso* declared unconstitutional Apr. 27, 1925, *Franchise Motor Freight Ass'n v. Railroad Commission*, 69 C. D. 473; 235 Pac. 1000.)

SEC. 6. No transportation company may issue any stock or stock certificate, or any bond, or any note

or other evidence of indebtedness payable at a period of more than twelve months after the date thereof unless such transportation company, in addition to the other requirements of law, shall first have secured from the railroad commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue or the proceeds thereof are to be applied and that, in the opinion of the railroad commission, the money, property or labor to be procured or paid for by such issue is reasonably required for the purpose or purposes specified in the order and that, except as otherwise permitted in the order in the case of bonds, notes and other evidences of indebtedness, such purpose or purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income. Such order may be made, in the discretion of the railroad commission, either with or without a public hearing. Except as in this section otherwise provided, the provisions of section fifty-two of the public utilities act referring to the purposes for which stocks and stock certificates, bonds, notes and other evidences of indebtedness, may be issued and the application of and the accounting for the proceeds thereof, the powers and duties of the railroad commission and the rights and duties of public utilities with reference thereto, the legal status of stocks and stock certificates and of bonds, notes and other evidences of indebtedness, issued without an order of the railroad commission then in effect, and the relationship of the State of California to such stocks and stock certificates, and

such bonds, notes and other evidences of indebtedness, shall apply to and govern the issue of stocks and stock certificates, and of bonds, notes and other evidences of indebtedness, of transportation companies with the same force and effect as though section fifty-two of the public utilities act were restated in this section with the substitution of the words "transportation company" for the words "public utility" and of the words "transportation companies" for the words "public utilities". The provisions of section fifty-seven of the public utilities act referring to fees to be charged and collected by the railroad commission for certificates authorizing the issue of bonds, notes or other evidences of indebtedness of public utilities shall apply to and govern authorizations by the railroad commission of the issue by transportation companies of bonds, notes or other evidences of indebtedness. [Amended, Ch. 280, Stats. 1919, p. 457.]

SEC. 6a. Every transportation company shall annually furnish to the commission at such time and in such form as the commission may require a report in which the transportation company shall specifically answer all questions propounded by the commission upon or concerning which the commission may desire information. The commission shall have authority to require any transportation company to file monthly reports of earnings and expenses, and to file periodical or special or both periodical and special reports concerning any matter about which the commission is authorized by this or any other act to enquire or to keep itself informed, or which it is required to en-

force. All reports shall be under oath when required by the commission. [Added, Ch. 840, Stats. 1921, p. 1609.]

SEC. 6*b*. No transportation company subject to the provisions of this act shall, directly or indirectly, issue, give or tender any fare, ticket, free pass, or free or reduced rate transportation for passengers or freight between points within this state, except to such person or persons as common carriers under and in accordance with the provisions of the public utilities act, are permitted to issue such fare, ticket, free passes, or free or reduced transportation and except to officers or employees of transportation companies as defined under this act. [Added Ch. 840, Stats. 1921, p. 1609.]

SEC. 7. (a) In all respects in which the railroad commission has power and authority under the constitution of this state or this act, applications and complaints may be made and filed with the railroad commission, process issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearing filed and acted upon, and petitions for writs of review or mandate filed with the supreme court of this state, considered and disposed of by said court, in the manner, under the conditions and subject to the limitations and with the effect specified in the public utilities act.

(*b*) No person shall be excused from testifying or from producing any book, waybill, document, paper or account in any investigation or inquiry by or hear-

ing before the commission or any commissioner or examiner when ordered to do so, upon the ground that the testimony or evidence, book, waybill, document, paper or account required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall, under oath have testified or produced documentary evidence; *provided*, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained shall be construed as in any manner giving to any transportation company immunity of any kind. [Amended, Ch. 153, Stats. 1925, p. 302.]

SEC. 8. Every officer, agent or employee of any corporation, and every other person who violates or fails to comply with, or who procures, aids or abets in the violation of any provision of this act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, of the railroad commission, or who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation, or any part or provision thereof, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

SEC. 9. Neither this act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except in so far as the same may be permitted under the provisions of the constitution of the United States and the acts of congress; *provided, however*, that with reference to transportation companies operating solely in interstate commerce between any point or points within this state and any point or points in any other state or in any foreign nation, the railroad commission shall have the power to prescribe such reasonable, uniform and non-discriminatory rules and regulations in the interest and aid of public health, security, safety, convenience and general welfare as shall in its opinion be required by public convenience and necessity. [Amended, Ch. 254, Stats. 1925, p. 433.]

SEC. 10. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

SEC. 11. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. The provisions of an act entitled "An act providing for the sale of street railroad and other franchises in

counties and municipalities and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts (approved March 22, 1905; Stats. 1905, p. 777),'' are declared not to apply to the use of highways for the kind of transportation herein regulated.

Appendix No. 2

S. F. No. 11467. In Bank. December 23, 1925.

Henry E. Holmes et al.,	}	Petitioners,
vs.		
Railroad Commission of the State of California et al.,	}	Respondents.

[1] AUTO STAGE AND TRUCK TRANSPORTATION ACT—AMENDMENT OF 1919—REGULATION OF PRIVATE CARRIERS—JURISDICTION OF RAILROAD COMMISSION.—The legislature by the 1919 amendment to the Auto Stage and Truck Transportation Act plainly intended and attempted to extend the jurisdiction of the Railroad Commission to private carriers when engaged in the business of transportation companies as there defined and to subject such private carriers to the burdens, obligations and limitations imposed by that act.

[2] ID.—USE OF HIGHWAYS—CONTROL BY STATE.—It is now universally recognized that the state has the power to impose the burdens and limitations prescribed by the Auto Stage and Truck Transportation Act upon private carriers when using the public highways for the transaction of their business in the transportation of persons or property for hire.

[3] ID.—RIGHT TO USE HIGHWAY FOR PRIVATE BUSINESS—CONSTITUTIONAL LAW.—The rule stated by the Supreme Court of the United States in *Buck v. Kykendall*, 45 Sup. Ct. Rep. 324, that "A citizen may have, under the fourteenth amendment, the right to travel and transport his property upon them (the public highways) by auto vehicle, but he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause," is equally applicable to all persons who seek to make a special and private use of the public highways by transacting their private business thereon, and it applies with equal force to private carriers who engage in the business of transportation for hire upon the public highways.

[4] ID.—USE OF HIGHWAYS BY PRIVATE CARRIERS FOR HIRE—COMMON CARRIERS.—The reason for the rule which authorizes the state to prohibit the private use of the highways by such carriers is not that they are common carriers, but it is that they are making a private use of the public highways, which are owned and paid for by the public and which are open alike to all persons.

[5] STATUTORY CONSTRUCTION—UNIFORM OPERATION—CLASSIFICATION.—A statute is not lacking if it operates alike upon all those comprised within a class defined therein which is based upon some natural, inherent or constitutional ground of classification.

[6] AUTO STAGE AND TRUCK TRANSPORTATION ACT—DISCRETION OF RAILROAD COMMISSION—CONSTITUTIONAL LAW.—There is no merit in the suggestion that the Auto Stage and Truck Transportation Act is unconstitutional in that it vests an arbitrary discretion in the Railroad Commission, since the discretion of the Commission is not arbitrary but is controlled and guided by the relation of the facts found by it to the public convenience and necessity.

Application for certiorari to review an order of the Railroad Commission directing petitioners to desist from operating automobile trucks on the public highways. Order *affirmed*. Shenk, J., *dissents*.

For Petitioners—Thelen & Marrin.

For Respondents—Carl I. Wheat, W. M. Taylor.

For Respondent Highway Transport Co.—Gwyn H. Baker.

For Respondent S. B. McLenegan & Son—Walter H. Robinson.

Review to annul a decision and order of the respondent Railroad Commission. The decision sought to be reviewed was the outcome of a proceeding before the Commission wherein the respondents Highway Transport Company and S. B. McLenegan & Son, both “certificated” common carriers of freight by motor truck between San Francisco and San Jose and intermediate points, filed complaint alleging that the petitioners herein were operating motor trucks without having obtained a certificate of public convenience and necessity to do so for the transportation of freight for hire over the public highways between San Francisco and San Jose and intermediate points along and over the same routes and roads over which the complainants were operating; that such operations were in violation of law, were in direct competition with the complainants, and resulted in injury and damage to them. The defendants therein, petitioners here, filed an answer denying the allegations of the complaint and setting up as a separate defense that defendants were the owners of certain automobile trucks which they leased to a number of “se-

lected" shippers of freight for use by said shippers in the distribution of merchandise between San Francisco and such points in San Mateo and Santa Clara counties as from time to time served the convenience and necessity of said shippers. The answer further denied that the defendants were common carriers, that they operated between fixed termini or over a regular route, that they were operating in violation of law and that they were subject to the jurisdiction of the Railroad Commission. Upon the issues thus joined the Railroad Commission after due notice and after a full and extended hearing rendered its decision and order now before this court for review, wherein it was found that the defendants, petitioners herein, were operating as a transportation company as that term is defined in section 1 (c) of Chapter 213, Statutes of 1917 as amended, and that they were engaged in the operation of motor trucks over the public highways for compensation, over a regular route and between fixed termini, namely, "San Francisco to San Jose and intermediate points". The Commission thereupon made its order directing the defendants to cease and thereafter to desist from any and all such transportation unless and until they should secure a certificate of public convenience and necessity therefor. The defendants, after the denial of their petition for a rehearing of said order and decision, instituted the present proceedings in this court for a writ of review to annul the same.

Petitioners were engaged in operating three motor trucks in the transportation of merchandise consisting

principally of drugs, drug sundries and groceries from wholesale houses in San Francisco to retail dealers in San Jose and at other points in Santa Clara and San Mateo counties, which points, for the most part, are intermediate points between San Francisco and San Jose. Petitioners operated under separate contracts with the several shippers, twenty-three in number, each contract being entered into severally by petitioners as one party and by one of the shippers as the other party thereto. These contracts were substantially alike in their terms (except as to minor variations not deemed pertinent to the present inquiry). By each of these contracts the petitioners purported to lease their trucks to the shipper for use by the latter in transporting its merchandise from San Francisco to points in Santa Clara and San Mateo counties at an agreed rental of \$19.50 per truck per day. It is further provided that if on any day only a portion of the capacity of any truck is used for such transportation the rental shall be such proportion of said rental of \$19.50 as is represented by the ratio which the capacity of the truck actually utilized in the transportation of the lessee's merchandise bears to the total agreed capacity of the truck, and, further, that the minimum rental in connection with any transportation shall be based on one-thirtieth of the capacity of the truck. It is apparent from the other provisions of these "leases" and from the manner in which they were performed by the parties that they are nothing more than contracts for the transportation of merchandise for compensation at the rate of thirty-two

and one-half cents per hundred pounds, subject to a minimum charge of sixty-five cents per shipment. The Commission so found and its finding is abundantly supported, if not compelled, by the evidence. The Commission did not expressly find upon the issue as to whether or not the petitioners were operating as common carriers, which was alleged in the complaint and denied in the answer. The finding is that the petitioners "are operating a transportation company as that term is defined in section 1 (c) of chapter 213 of the Statutes of 1917 and amendments thereto; that they are engaged in the operation of auto trucks over the public highways for compensation, over a regular route and between fixed termini, namely, San Francisco to San Jose and intermediate points, . . ." Petitioners contend that this finding must be taken by us as a negative finding upon the allegation that they were operating as common carriers and we are inclined to agree with this contention. The carrier respondents strongly insist that under the rule which requires the construction of findings so as to support the judgment we should construe this as a finding that petitioners were in fact operating as common carriers and that such finding is amply supported by the evidence herein. It may be that the evidence herein would sustain such a finding if it had been made by the Commission. As to that we express no opinion. We are of the opinion that the present is not a proper case for the application of the rule invoked by the carrier respondents. A careful reading of the entire decision of the Commission, of which

the quoted finding forms but a part, makes it clear that the Commission did not intend to find as a fact that petitioners were operating as common carriers. On the contrary, the Commission took the view that petitioners were subject to its jurisdiction under the other facts and circumstances found herein, regardless of the question whether they were operating as common carriers or as private carriers, and in accordance with that view it deliberately and intentionally omitted to find upon this question. If, therefore, we should conclude that the operation of petitioners as common carriers is a fact essential to the jurisdiction of the Commission over them, it would be our duty to annul this decision and order. This precise question was involved in the recent case of *Frost v. Railroad Commission* (70 Cal. Dec. 457, — Pac. —), which was decided by us adversely to petitioners' contentions herein. That case must be regarded as controlling with respect to this phase of the present inquiry, and the respective counsel for the petitioners and for the Railroad Commission so concede. Counsel for petitioners argue most earnestly that our decision in the Frost case is erroneous and should be promptly overruled. We have given careful consideration to these arguments and are not disposed to depart from our views as expressed in that case. The gist of our conclusion in that case may be briefly stated as follows: [1] The legislature by the 1919 amendment to the Auto Stage and Truck Transportation Act plainly intended and attempted to extend the jurisdiction of the Railroad Commission to private

carriers when engaged in the business of transportation companies as there defined and to subject such private carriers to the burdens, obligations and limitations imposed by that act. The question, then, is whether the state has the power to impose such burdens and limitations upon private carriers when using the public highways for the transaction of their business or whether its power in this behalf is limited in its application to public carriers. [2] It is now universally recognized that the state does possess such power with respect to common carriers using the public highways for the transaction of their business in the transportation of persons or property for hire. That rule is stated as follows by the Supreme Court of the United States: "A citizen may have under the Fourteenth Amendment, the right to travel and transport his property upon them (the public highways) by auto vehicle, but he has no right to make the highways his place of business by using them *as a common carrier for hire*. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause." (*Buck v. Kykendall*, 45 Sup. Ct. Rep. 324. Italics added) Petitioners emphasize the words which we have italicized and insist that this rule is limited in its application to common carriers. [3] We think it is equally applicable to all persons who seek to make a special and private use of the public highways by transacting their private business thereon and that it applies with equal force to private carriers who engage in the

business of transportation for hire upon the public highways. [4] The reason for the rule which authorizes the state to prohibit the private use of the highways by such carriers is not that they are common carriers. It is that they are making a private use of the public highways, which are owned and paid for by the public and which are open alike to all persons. It is true that common carriers are subject to regulation by the state because the fact that they are engaged in public service causes their business to be affected with public interest and thus justifies the regulation thereof by public authority. But this is not, as it seems to us, the reason for the existence of the rule above quoted. The circumstance that they are public carriers would subject them to *regulation*, but it would not subject their business to *complete prohibition*, it being a business which is not inherently unlawful or wrongful, but it is universally conceded that the state does have the power and the right to completely prohibit the use of its public highways by a common carrier. This must rest not upon the fact that he is a common carrier, but upon the fact he is making a private use of the public highways. This conclusion is not based, as petitioners assert, upon the power of the state to *regulate the use* of its highways. It is based upon the power of the state to *prohibit the private use* of its highways or in its discretion to grant the privilege of such private use upon such conditions as it may see fit to impose. By the statute here in question the state says in effect to the citizen: "I will grant you the special privilege

of using my highways for your private business upon condition that you in turn submit yourself and your property to such regulations as I impose. I will not compel you to submit to these regulations, but if you are not willing to do so, I shall not grant you this special privilege." A conclusion somewhat analogous to this is presented in the case of *Producers Transportation Company v. Railroad Commission* (176 Cal. 499), relied upon by petitioners herein. It was there held that a state has no power by mere legislative fiat, nor even by such fiat embodied in its constitution, to transmute a private carrier into a common carrier. With that conclusion we are in entire accord, but it was also there held that if a private carrier exercises the right of eminent domain in aid of his transportation business he will be deemed thereby to have dedicated his transportation system to a public use and to have thereby become a public carrier. The circumstance that the right of eminent domain is a right of sovereignty which is inherent in the state does not seem to us of particular importance. The important fact, as it seems to us, is that the right of eminent domain is not possessed by individuals as a matter of right. When the state offers to grant this right to an individual, it is as to him a special privilege. If the state offers this privilege to him upon expressed conditions, he will be deemed, if he exercises the right, to have accepted the offer and to have agreed to the conditions. He is under no compulsion to submit to the conditions. If he does not submit to the conditions he cannot exercise the privilege. If

he does exercise the privilege he will be deemed to have voluntarily agreed to the conditions. Herein lies the distinction between the present case and the case of *Michigan Public Utilities Comm. v. Duke* (45 Sup. Ct. Rep. 191). Counsel for petitioners direct our attention to the fact that the reasoning adopted by us in the Frost case and adhered to herein was urged upon the Supreme Court of the United States in the Duke case and was by that court rejected. We agree that it was properly rejected in that case because it was not tenable under the facts of that case. It could not be said that by continuing in the transportation of property for hire after the enactment of the Michigan Public Utilities Act Duke had voluntarily elected to dedicate his property to a public use, because Duke had no opportunity for an election. He had no choice but to continue in the transportation of property after the enactment of the statute. He was under compulsion so to do because of his contracts which were in existence and subsisting at the time of its enactment. Therefore, to hold the statute applicable to him would be to say in effect that the state had the power to transmute him from a private carrier into a public carrier *nolens volens*, and this we agree it could not do. This is what we had in mind when we said in this connection in the Frost case, "to give it effect in its application to his situation would have been to impair the obligation of those contracts." We intended thereby to point out that the only liberty of choice offered by the Michigan statute in its application to Duke was a Hobson's choice between

dedicating his property to the public on the one hand and breaching his contracts on the other. We did not intend thereby to intimate that the decision of the United States Supreme Court in the Duke case was rested in part upon the impairment of the contracts provision of the federal Constitution. It clearly was not. In the present case the petitioners did not enter into the transportation business until long after the enactment of the statute here in question. We find here no such obstacle as there was in the Duke case in the way of the conclusion that by so doing petitioners must be deemed to have voluntarily elected to submit themselves to the conditions imposed by the statute. We do not agree with petitioners that the Washington decisions cited by us in the Frost case have all been overruled by the later decisions of that court in *Davis v. Metcalf* (229 Pac. 2). They were not expressly overruled therein. On the contrary, they are cited with apparent approval. It must be conceded, however, that the implications of some of the language used in the opinion in that case appear to be in conflict with our conclusions in the Frost case and herein. That case, however, did not involve the question of the *power* of the Railroad Commission to make an order in respect of a private carrier such as is here under review. That case arose as a suit in equity by a certificated carrier to procure an injunction restraining an uncertificated carrier from transporting goods for compensation over a regular route in competition with the plaintiff. The trial court denied the injunction and the Supreme Court affirmed the judg-

ment. It does not necessarily follow from anything said or decided in that case that if the Railroad Commission of that state had, after a hearing, made an order requiring the defendant to desist from further transportation over the highways until he obtained a certificate of public convenience and necessity, that such order would have been annulled by the court. That question has not yet been litigated in the state of Washington so far as we are advised. The recent Utah case of *State v. Nelson* (238 Pac. 237) is, we think, distinguished from the present case by the differences in the Utah statute. The grant of jurisdiction to the commission in that statute is "to supervise and regulate every public utility in this state as defined in this title . . ." The term "public utility" is defined to include "every . . . automobile corporation . . . *where the service is performed for or the commodity delivered to the public* or any portion thereof". The term "common carrier" is defined to include "every . . . automobile corporation . . . *operating for public service* within this state; and every person or corporation . . . engaged in the transportation of persons or property *for public service* over regular routes between points within this state". (Italics added.) The section of the Utah statute providing for the issuance of certificates of public convenience and necessity, while it does not expressly so provide, nevertheless indicates by clear implication the legislative intent that it shall be applicable only to public utilities as above defined. The Utah court held correctly, as we think, that the intent of the Utah

statute was to limit the regulatory powers of the railroad commission to common carriers and other public utilities. Having reached this conclusion the language in its opinion which is relied upon by petitioners herein must, as it seems to us, be regarded as obiter. We agree with petitioners that the case of *Hissem v. Guran*, 146 N. E. 808, is in conflict with our conclusion in the Frost case herein. It may be noted, however, that the reasoning which has impelled us to our conclusion does not appear to have been suggested to or at all considered by that court. We are disposed to adhere to that conclusion, notwithstanding the absence of any direct authority to support it.

If the foregoing conclusion is sound, it is, as it seems to us, a sufficient answer to all of petitioners' contentions based upon the guarantees of the federal Constitution, with the possible exception of the contention that the Auto Stage and Truck Transportation Act as amended and as construed by us denies to petitioners the equal protection of the law. Petitioners' first point under this contention is disposed of by our decision in the case of *Franchise Motor Freight Assn. v. Seavey*, 69 Cal. Dec. 473, — Pac. —. Petitioners seemingly take the position that there is no legitimate basis for a classification and distinction between private carriers engaged in the business of transporting freight over the public highways on the one hand and private individuals engaged in other lines of business transporting their own freight over the public highways as an incident to such business on the other hand. Petitioners propound the follow-

ing question: "What reasonable ground of distinction is there between a *private* carrier engaged in the business of transporting his own freight over the public highway between two points and another *private* carrier who is engaged in the transportation of the same class of freight between the same points at the same time over the same highway, the only distinction being that the freight transported by the latter belongs to his neighbor or some other third party instead of to himself?" The facts assumed in this question are self-contradictory. One who transports merely his own freight over the highway is not a carrier, private or otherwise. He may be a farmer or a manufacturer or a merchant or what not, but the business in which he is engaged is not the business of transportation. He is not a carrier unless he engages in the business of transportation of the persons or property of others for compensation. One who transports merely his own goods is of necessity engaged in some business other than transportation and the transportation of such goods is no more than an incident to such business. So, also, one who transports the goods of another as a servant or agent of such other is not engaged in the business of transportation, but in so doing is engaged in the business of his master or principal, whatever that business may be. But one who engages as an independent calling in the transportation of goods for another or for others under contract and for compensation is engaged in the business of transportation and is a carrier. The true question in this behalf is, therefore, is there a natural

or inherent basis for a classification and distinction between those who engage in the business of transportation of the property of others for compensation over the public highways, thus making a private use of those highways, and those on the other hand who are engaged in other lines of business and who use the highways in the transportation of their goods merely as an incident to such business, for which purpose the highways are open alike to all? This question seems to us to answer itself. [5] It is too well settled to require citation of authority that a statute is not lacking in uniformity if it operates alike upon all those comprised within a class defined therein which is based upon some natural, inherent or constitutional ground of classification.

[6] We find no merit in the suggestion that the act is unconstitutional in that it vests an arbitrary discretion in the Railroad Commission. The discretion of the Commission is not arbitrary but is controlled and guided by the relation of the facts found by it to the public convenience and necessity (*Tarpey v. McClure*, 190 Cal. 593, 600, and cases cited).

The final contention necessary to be considered herein is that the finding of the Commission to the effect that petitioners were operating between fixed termini and over a regular route is unsustained by the evidence. The statute defines the words "between fixed termini or over a regular route" to mean "the termini or route between or over which any corporation or person * * * usually or ordinarily operate any automobile, bus, auto truck, stage or auto stage,

. even though there may be departures from said termini or route, whether such departures be periodic or irregular". It also provides that this shall be a question of fact and that the finding of the Commission thereon shall be final and shall not be subject to review. We agree with petitioners that the finding is, however, subject to review, notwithstanding the last-mentioned provisions of the statute, for the reason that the fact in question is one which is essential to the jurisdiction of the Commission. Such review, however, cannot extend beyond the inquiry as to whether or not there is some substantial evidence to support the finding. If there is, the finding must be sustained, no matter how much evidence there may be in conflict therewith. In this connection it is to be noted, however, that it is not necessary that the evidence shall sustain both of the findings of the Commission, namely, that petitioners were operating between fixed termini and that they were operating over a regular route. The statute is in the disjunctive and it is sufficient in this connection to sustain the jurisdiction of the Commission if there was substantial evidence to support either of these findings. The decision of the Commission contains a fair resume of the evidence upon this question and we quote therefrom as follows: "Defendants contend that they are not operating between fixed termini nor over any regular route, because they have had no depot at any point in San Mateo or Santa Clara counties, nor have they a telephone at such points; that deliveries are made either to store or sidewalk; that there is no

point in any city or town in San Mateo or Santa Clara counties which constitutes a terminus, since the destination of trucks is determined entirely by the load which the 'lessees' of the particular truck happen to offer for transportation on that particular trip; and that there are no cities or towns in San Mateo or Santa Clara county to which any trucks regularly go on all trips.

"It is true that each and every truck operated down the Peninsula by defendants does not stop for pick-up or delivery of merchandise at each and every point along the highway, San Francisco to San Jose, inclusive, and that on occasions the trucks have gone off the highway for several miles to make deliveries to points such as the County Poor Farm back of Belmont, Camp No. 4 on the Skyline Boulevard, Chadwick and Sykes' Camp three miles east of Redwood City, etc. The evidence, however, does show that there is only one main highway known as the Peninsula Highway over which the trucks of the defendants usually or ordinarily operate; that defendants' drivers are instructed during fair weather to use what is known as the Bay Shore Highway out of San Francisco to its connection with the main Peninsula Highway at San Bruno and in rainy weather to use the Mission Road through Colma to San Bruno. From San Bruno there is but a single route through Burlingame, San Mateo, Belmont, Redwood City, Menlo Park, Palo Alto and other intermediate points, to San Jose. This main State Highway is usually and ordinarily used with the exception of the infrequent

occasions upon which, as mentioned above a truck carries merchandise destined to points somewhat off the highway.

"In connection with defendants' Exhibit No. 12, entitled 'Some Routes used by H. E. and P. W. Holmes', P. W. Holmes testified that no two of such routes were alike. Route No. 3 names Redwood City only; No. 5 Burlingame-Redwood City; No. 12 Redwood City-Burlingame. These three routes, however, when taken in connection with San Francisco as a northern terminus, are identical in every respect. Transposing the names of communities does not differentiate as to route over which the trucks travel, but merely shows a difference in the routing of particular deliveries. In fact, this entire exhibit in the main substantiates the contention of complainants that defendants' trucks do usually and ordinarily operate over a regular route or between fixed termini as represented by manifests therein named.

"Defendants further contend that they have no fixed termini due to the fact that the manifests submitted in the evidence covering the month of January, 1924, show a different southerly terminus on different trips. Analysis of this evidence shows that during the thirty-day period above mentioned, San Jose or a point immediately adjacent to the city limits of San Jose, such as Alum Rock, Meridian Road, etc., appears as the most southerly terminus upon twenty occasions, the most southerly destination on other occasions being some point along what is

known as the main Peninsula Highway, San Francisco to San Jose, such as Redwood City, which appears some seven times, or Palo Alto, which appears some five times.

"Certainly if a truck carries no merchandise for delivery upon a specified trip which would necessitate it going the entire length of its route and has no call for a pick-up on the northbound trip, it would in any case turn back after making its most southerly delivery, and if this Commission should hold that the law contemplated this class of operation as not being over a regular route no truck operator in the state could be held to fall within the provisions of the state regulation, due to the fact that one or more of his trucks on infrequent occasions might not cover the entire route usually or ordinarily served by him."

In addition to the foregoing it may be noted that at the hearing before the Commission petitioners introduced an exhibit consisting of a schedule showing the points of all deliveries made by them during the second week of each of the months of December, 1923, and January, February and March, 1924, in connection with which they produced testimony that the deliveries during those weeks were fairly typical of all of their operations. The schedule shows all of the deliveries made by petitioners on twenty-three working days comprising those weeks and it appears therefrom that upon every one of those days petitioners made deliveries from San Francisco to San Jose and to intermediate points. Under the statute it is immaterial that there were departures from the termini

and from the route "whether such departures be periodic or irregular". We are satisfied that the finding of the Commission is sustained by the evidence, and if it were conceded that the evidence would equally sustain a contrary finding that circumstance would be immaterial.

The decision and order of the Commission are affirmed and the writ discharged.

MYERS, C. J.

We concur:

LAWLOR, J.

RICHARDS, J.

WASTE, J.

SEAWELL, J.

LENNON, J.

DISSENTING OPINION.

I dissent. I cannot agree with the reasoning and conclusion of the prevailing opinion. It appears that the petitioners had applied to the Commission for a certificate of public convenience and necessity. By that application they impliedly consented to subject themselves to the jurisdiction of the Commission and to comply with the conditions which the law and the Commission might impose. Included in those conditions under section 4 of the Auto Stage and Truck Transportation Act would be that the Commission should have the power to fix their rates, regulate their service and in general provide that the applicant operate as a common carrier in the event that the

certificate be issued. The application however was denied. Such action was within the power of the Commission under section 7 of the act, which provides that the Commission may grant or deny such a certificate "with or without hearing". The petitioners established themselves as a private carrier. The respondent certificated carriers filed a complaint against them before the Commission, alleging that the petitioners were a transportation company as defined by the Auto Stage and Truck Transportation Act and as such were operating in direct competition with the complainants and were injuring and damaging their business. The petitioners were summoned before the Commission and in an answer filed by them they denied that they were a transportation company as defined by the act. After notice and an extended hearing the Commission found that the petitioners were a transportation company operating as a private carrier and issued an injunction directing them "to cease and hereafter to desist from any and all such transportation unless and until they have secured from this Commission a certificate declaring that public convenience and necessity require the resumption or continuance thereof". The effect of the decision and order of the Commission is to put the petitioners out of business, for it enjoins them from operating "unless and until" they obtain a certificate and on application the Commission denies the certificate.

Under sections 22 and 23 of article XII of the Constitution and the decisions of this court the Com-

mission has jurisdiction only of the regulation and control of public utilities and matters which are germane to such regulation and control. This is conceded in the prevailing opinion but it is held, following the Frost case, that the regulation of such a private carrier is so germane because forsooth the private carrier is in competition with the public carrier. This conclusion in my opinion is not supported either by reason or authority. If that conclusion be sound the result would be that the Commission may now require a truck owner, engaged exclusively in the business of operating his truck for transportation of freight on the public highways under contract with the sole owner of a chain of stores, to apply for a certificate of public convenience and necessity or go out of business and by denying his application put him out of business. To pursue the subject still further it would logically follow that the Commission could be endowed by the legislature under the present constitutional grant with the power to say that no one may use the public highways for the transportation of his own goods because by so doing he would take from the certificated operator a revenue which the latter might otherwise receive. By the same reasoning the legislature could vest the Commission with power to prohibit the use of private passenger automobiles operating on the public highway because such use would be in competition with regulated common carriers of passengers with possible destruction of the business of the latter. Such a result may not be contemplated as within the power of the state and more

particularly within the constitutional powers of the Railroad Commission as defined and limited by this court.

Nor is the action of the Commission authorized by the Public Utilities Act or the Auto Stage and Truck Transportation Act. The power of the Commission to entertain complaints under the Public Utilities Act, under sections 60 and 61a, is with reference to "any act or thing done or omitted to be done by any public utility". Section 7 of the Auto Stage and Truck Transportation Act provides that in all respects in which the Railroad Commission "has power and authority under the Constitution of this state or this act" complaints *may* be filed with the Commission and disposed of "in the manner, under the limitations and with the effect specified in the public utilities act". In *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573, this court said at page 578: "By specific reference to the public utilities act the commission is given power to hear and determine complaints against transportation companies in exactly the same manner and to the same extent as it has of complaints against other public utilities. This power is conferred by section 7 of the 'Auto Stage and Truck Transportation Act'. * * * It obviously follows that sections 60 and 61 (a) of the public utilities act, as originally enacted and still in force, which prescribe the power of the commission to hear and determine complaints against public utilities make [mark] and measure the power of the commission to proceed in the instant case." Said section is not

merely procedural. It vests power in the Commission to entertain complaints and to take action thereon. The restrictions and limitations specified in the section are that, for the purpose of procedure, the terms of the Public Utilities Act shall apply.

If the Auto Stage and Truck Transportation Act purports to vest in the Commission jurisdiction over private carriers, in my opinion it is to that extent contrary to the Constitution. Such a conclusion would not deprive the Commission of the power to entertain complaints against transportation companies which are common carriers in fact but are seeking to avoid the requirements of the act by masquerading as private carriers. If the petitioners had been found to be a common carrier in fact, the Commission would have had jurisdiction over them and could have properly exercised its authority in prohibiting their operations. But when the Commission found the petitioners to be a private carrier, and it did so find, the jurisdiction of the Commission over them was at an end. It seems to me that the prevailing opinion has misconceived the real purpose and object of the Auto Stage and Truck Transportation Act. The opinion fails to distinguish between regulation looking to safety and the conservation of the highways and the regulation of persons by whom the highways may be used. As to regulations concerning safety and the conservation of the highways they must be uniform and apply equally as between those similarly situated and may comprehend all uses both public and private. The Motor Vehicle Act is

a familiar example of such regulation. But such an act necessarily prescribed a uniform course of conduct to which all must conform and when its requirements are met must be available to all. Use of the highways under such an act may be regulated, but not prohibited, with certain exceptions not material here. Concerning the regulation of the persons who may use the public highways it is unquestionably true that the state may not only regulate but may prohibit the use thereof by persons, firms or corporations engaged in the business of a common carrier. It may grant the privilege to one carrier and deny it to another. It may regulate the charges and service of a common carrier and it may prevent other common carriers from competing with a privileged carrier. Such is the purpose of the Auto Stage and Truck Transportation Act. In other words, the purpose of the regulatory provision here in question is to prevent, in the public interest, ruinous competition as between concerns engaged in a like public business. With reference to a similar act in the state of Washington the Supreme Court of the United States in *Buck v. Kuykendall*, 267 U. S., said: "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use but the persons by whom the highways may be used." In determining the persons by whom the highways may be used the state has no power, in my judgment, under the guise of prohibiting competition, to deny to its citizens the right to use the public highways for

their own private purposes, whether for business or for pleasure. But assuming that it has that right, and particularly the right to prohibit a private business use of the highways, as announced by the opinion, it would necessarily be true that such regulatory prohibitions must be uniform and apply to all similarly situated and be enforced through the medium of a state agency duly constituted for that purpose. But in this case a state agency whose judicial powers extend only to the regulation and control of public utilities and matters properly germane thereto, proceeds to hale before it a concern using the highways for its own private purposes, its private rights are adjudicated, it is found to be engaged in a private business and it is put out of business because, forsooth, its private business diminishes the revenues of a certificated common carrier. That the Commission acted judicially in determining, after notice and hearing and on evidence, the status of the defendants before it and in issuing the injunction cannot be denied. That the Commission may act judicially when legally authorized so to do is likewise beyond question. Its authority to act in that capacity, however, cannot be determined alone from a consideration of the amendment to the statute in 1919. Such a grant of power must come from the Constitution or from some act of the legislature which is constitutionally authorized. It is not contended, as indeed it may not be, that the Commission has direct grant from the Constitution to regulate private business. True, this court compelled the Commission to assume jurisdic-

tion of transportation companies prior to any legislative enactment on the subject (*Western Association etc. R. R. v. Railroad Comm.*, 173 Cal. 802), but the transportation companies before the Commission in the proceeding involved in that case and over which the Commission was required to take jurisdiction were admittedly common carriers and, as such, public utilities within the definition of section 23, article XII, of the Constitution. The whole purpose of that section and of the preceding section 22 in reestablishing the Railroad Commission and endowing it with extensive powers was to regulate and control public utilities privately owned (*City of Pasadena v. Railroad Commission*, 183 Cal. 526, 534), and it is settled by the decisions of this court beyond question that such additional powers as the legislature may confer upon the Commission must be "germane to the subject of regulation and control of public utilities". (*Pacific T. & T. Co. v. Eshleman*, 166 Cal. 640; *City of Pasadena v. Railroad Comm.*, supra; *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573.) The Commission recognizes that such is the rule, but contends "that the regulation of the type of carriage here in question is, because of its power to destroy regulated carriage, most cognate and germane to the subject of the regulation and control of public utilities [carriers]." I deny that the Commission has power to suppress and destroy a private business because such private business may be in competition with the business of the common carrier. This is, indeed, a curious but nevertheless an effective method

of taking private property for public use without compensation. Furthermore, if the question of competition be the test and the elimination of competition be germane to the subject of regulation and control of the public utility it is difficult to conceive why it is necessary to consider the use of the public highways in connection with such competition, for if the power to suppress competition be possessed by the Commission it may be exercised against the outlawed competitor whether he operate on the public highways or elsewhere. If the suppression of competition alone does not make such regulation germane to the subject of regulation and control of public utilities, then it cannot be made so germane under the guise of regulating the use of the public highways. We are here dealing with public and private concerns which use the public highways in their business, but the fact that they are so using them, in so far as competition is concerned, is a mere circumstance.

The prevailing opinion concedes that the conclusions reached are without direct precedent. By reference to the laws and decisions of other states it is found that Michigan, Ohio, Utah and Washington have statutes similar to our Auto Stage and Truck Transportation Act. The courts of last resort of those states, in construing their statutory provisions, have uniformly reached a conclusion opposed to the prevailing opinion (*Hissen v. Guran et al.*, (Ohio) 146 N. E. 808; *Davis & Banker v. Metcalf*, 131 Wash. 141, 229 Pac. 2; *State v. Nelson*, (Utah) 238 Pac. 237). The declaration of the Supreme Court of the

United States in *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, is directly in point. In that case Duke had employed 75 men and 47 motor trucks as a private carrier under three private contracts for the transportation of automobile bodies from Detroit to Toledo. Under the Public Utilities Act of Michigan, which concededly is essentially similar to our own Auto Stage and Truck Transportation Act, it was sought to subject Duke to regulation as a common carrier. The court said: "Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process clause of the fourteenth amendment. (*Producers Transportation Co. v. Railroad Commission*, 251 U. S. 228, 230; *Wolff Co. v. Industrial Court*, 262 U. S. 522, 536. On the facts above referred to, it is clear that, if enforced against him, the act would deprive plaintiff of his property in violation of that clause of the constitution." The prevailing opinion attempts to distinguish that case from the one at bar on the ground that Duke's contracts were outstanding at the time the Michigan statute took effect and for that reason the statute was not applicable to him. The Supreme Court of the United States did not base its decision on the impairment of contract clause, but on the fourteenth amendment. Such in my opinion should be the conclusion reached in this case, that

is to say, it should be decided that the petitioners, by reason of the act of the Commission, have been deprived of their property without due process of law, have been denied the equal protection of the law, and their private property has been taken for public use without just or any compensation. The order of the Railroad Commission should be annulled.

SHENK, J.



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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1925

No. 828

MARION L. FROST and WESLEY H. FROST,
co-partners,

Plaintiffs in Error,

vs.

RAILROAD COMMISSION OF THE STATE OF
CALIFORNIA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Subject Index

	Page
I. The facts	1
The statutory background.....	1
The case before the Railroad Commission.....	2
The State Supreme Court's decision.....	3
II. The question	4
III. The state court's decision should be sustained.....	5
IV. Plaintiffs' alleged "authorities".....	14
V. Conclusion	17

Table of Authorities Cited

	Pages
Buck v. Kuykendall, 267 U. S. 307; 69 L. ed. 623.....	19
Coast Truck Line v. Railroad Comm., 191 Cal. 257.....	12
Davis v. Metcalf (Wash.), 131 Wash. 141; 229 Pac. 2.....	15
Davis v. Nickell (Wash.) 218 Pac. 198.....	15
Ex parte Crowder, 171 Fed. 250.....	9
Ex parte Hogg, 70 Tex. Crim. 161; 156 S. W. 931.....	9
Hissem v. Guran et al. (Ohio), 112 Ohio State 59; 146 N. E. 808	17
In re Gilstrap, 171 Cal. 108.....	9
Michigan Public Utilities Commission v. Duke, 266 U. S. 570; 69 L. ed. 445.....	6, 14
Miller v. Board of Public Works, 69 Cal. Dec. 215.....	18
Motor Transit Co. v. Railroad Commission, 189 Cal. 573...	12
Packard v. Banton, 264 U. S. 140; 68 L. ed. 596.....	10
State v. Nelson (Utah), 238 Pac. 237.....	16
State v. Price (Wash.), 210 Pac. 787.....	15
Statutes of Calif. Auto Stage and Truck Transportation Act (Chap. 213, Stats. 1917, as amended).....	1
Statutes of Ohio, Ohio General Code, Sec. 614-2.....	17
Truax v. Corrigan, 257 U. S. 312; 66 L. ed. 254.....	18
Western Assn. of Short Line RRs. v. Railroad Commission, 173 Cal. 802; 162 Pac. 391.....	11



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I.

THE FACTS.

The facts involved in the present case are of extreme simplicity and are here briefly presented in tabloid form:

The Statutory Background.

In 1917 the California Legislature enacted the so-called "Auto Stage and Truck Transportation Act" (Statutes 1917, Chapter 213), by which the State Rail-

road Commission was given broad regulatory powers over common carriers by automobile of persons or property for compensation over the highways where the operation was conducted between fixed termini or over regular routes. In 1919 the Legislature amended this statute (Statutes 1919, Chapter 280), by adding words which admittedly purport to bring under regulation by the Railroad Commission not only the above mentioned common carriers, but also automotive carriers of persons or property operating under private contracts of carriage. Under this statute "transportation companies" by automobile were to be subjected to regulation, and the term "transportation company" was defined to include both of these types of carriers. It was specifically provided that no such "transportation company" should operate for compensation over the highways without first having secured from the Commission a certificate of public convenience and necessity so to do.

The Case Before the Railroad Commission.

One Happe, a certificated common carrier of goods by auto truck, complained against Frost and Frost, the present plaintiffs in error, alleging that they were operating as a "transportation company" in violation of this statute. (Trans. pp. 4 to 9.) A hearing was held, at which it appeared that Frost and Frost were, in fact, operating motor trucks for the transportation of property for compensation over certain public highways between fixed termini and over a regular route under a private contract of carriage. The Commission found that they were operating a "transportation company", as defined in the statute, and the

order was that they must cease and desist from such operation

“unless and until they shall have secured from the Commission a certificate that public convenience and necessity require the resumption or continuance thereof.” (Trans. p. 20.)

The State Supreme Court's Decision.

Upon writ of review, the State Supreme Court affirmed this order of the Commission, holding (1) that such private contract carriers upon the public highways might be subjected to reasonable regulation by the State without violation of constitutional rights; (2) that, under the Constitution and laws of California, such regulation might properly be exercised through the existing Railroad Commission, and (3) that the State Legislature had, in fact, placed the duty of effecting such regulation upon that body. Obviously, only the first of these is at issue here.

The Court expressly declared that the statute in question “does not and cannot” have the effect of transmuting a private contract carrier into a common carrier against his will, and we cannot make too clear the fact that there never has been and is not now any attempt of any nature, whatsoever, to force such carriers into the category of common carriers, or to force them to dedicate any of their property to public use, notwithstanding the innuendo to that effect which runs through much of plaintiffs in error's brief. The sole purpose of the State in enacting this legislation, and of the Railroad Commission in enforcing the same, is to impress upon such private carriers certain regulations so long as they desire to use the publicly

built and owned highways as the chief situs of their *business* of hauling goods for compensation. *We admit that they are not, and cannot be forced, directly or indirectly, to become common carriers.*

II.

THE QUESTION.

The sole question to be determined here is, therefore, whether the requirement by a State that such a private contract carrier obtain a certificate before operating automobile trucks *in the business of hauling property for compensation over the public highways* violates either the due process or the equal protection clauses of the Federal Constitution.

There is no question here of arbitrary discrimination against these plaintiffs in error, for they have not as yet applied for a certificate to cover operations of the nature proposed by them, and the sole ruling of the Railroad Commission was that they should not so operate unless and until they had secured such a certificate. If, upon proper application, the Railroad Commission had arbitrarily denied them the certificate in question, a totally different problem would be presented to this Court.

Nor are we in this case concerned with any of the other provisions of this statute. Some may and some may not be applicable to such carriers. We reiterate that the *sole question here* is whether or not a State may require of one who desires to use its public highways as the chief and paramount situs of his *private*

haulage business to come to some State agency and obtain a certificate so to do.

III.

THE STATE COURT'S DECISION SHOULD BE SUSTAINED.

The reasoning upon which the California Supreme Court based its opinion that this order of the Railroad Commission violated none of these plaintiffs' Federal constitutional rights is based upon the premise that, while the public highways of the State are open and free to all persons for traverse and communication at all times, nevertheless, the State may properly impose reasonable conditions and regulations upon any particular individuals who desire to use such publicly constructed and maintained highways *as the chief situs of their business of transporting persons or property thereover as a business for hire*—whether such use be in the nature of common carriage or otherwise. While this is unquestionably a case of first impression, we believe that this reasoning of the State Court is sustainable upon grounds both of law and of logic.

Plaintiffs in error present for consideration the following purported dilemma. Say they, in effect: (1) If they apply for a certificate under this statute and—after due notice, hearing, opportunity to present testimony, and formal findings—it is *denied*, they are deprived of the right (which they claim to be inviolate) of transporting property in their trucks over the public highways for hire under private con-

tracts; whereas, (2) if they apply for a certificate and it is *granted*, they will be subjected to regulations which, say they, would, in effect, force them into the business of common carriage. Both of these results they urge to be unconstitutional.

This second proposition we believe has already been met. There has been no attempt here, either by Legislature or Commission, to make these persons unwillingly assume the status of common carriers. They are not, in fact, nor in effect, to be made to assume such status. Most of the many cases cited by counsel for plaintiffs go off on the point that there has been an attempt to do this, and throughout their brief there appear statements which seem to suggest that this was attempted here. Thus, on page 36 of their brief, counsel quote from the argument of the State in the case of *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 69 L. ed. 445, to the effect that it is competent for the Legislature "to require those who at the passage of the Act are engaged or thereafter engage in motor vehicle transportation for hire on the public highways to do that business *as common carriers*", and counsel add:

"That is the very argument on which the *Frost* decision is based."

We submit that the most cursory reading of the decision of the State Court in this case discloses that nothing could be farther from the fact. Plaintiffs were and are admitted to be private rather than common carriers, and plaintiffs cannot now by these statements and innuendo, force upon defendants a

contention that is not on' - not made, but has all along been, and is now expressly admitted to be unsound. The regulation sought to be imposed upon them is not as *common carriers*, but as *carriers for hire by private contract*. Every statement in their brief hinting that either in fact or in effect, directly or indirectly, they are to be made to become common carriers is thus negatived. Neither by the statute nor by this decision are they compelled or even urged, to dedicate any of their properties to public use. Under this statute all private carriers may continue to exist as private carriers. They are not obliged to serve or undertake to serve the public generally, and assuredly no such private carrier could be said to have devoted his properties to public use or to have been forced to become a common carrier when he is under no duty to serve the public generally. We trust that this will settle this contention.

In this connection plaintiffs have been at great pains to analyze certain provisions of the California Auto Stage and Truck Transportation Act which they claim can logically be applied only to common carriers. We respectfully submit that the applicability of these provisions is not now before this Court for consideration or determination. The portion of this statute here involved, and the only portion here involved, is that which requires every "transportation company" to secure a certificate of public convenience and necessity before operating auto trucks for hire over the public highways. Plaintiffs were ordered to cease and desist from their operations unless and until *that provision* had been complied with. We

shall meet the question of the applicability of the other provisions of the Act to non-common carrier operators when those questions arise.

So much for the second horn of plaintiffs' purported dilemma.

* * * * *

The first horn of this dilemma merits, however, somewhat more extended consideration. It should, of course, be recalled that as yet plaintiffs have made no application for a certificate, relying solely upon their contention that the State cannot require anything of this sort from a non-common carrier. To require them even to ask for such a certificate will, say they, take from them property without due process of law, and will deny to them the equal protection of the laws.

Plaintiffs' position is predicated upon their assumption that they and all other persons possess an inherent and unqualified right not merely to traverse the public highways, but also to make of those highways the main situs or instrumentality of their *business of hauling goods for hire*. And this, say they, must be without let, hindrance or regulation on the part of the State save as all automotive vehicles may be required to be licensed, and all automobile operators may be required to provide their vehicles with proper lights, brakes and other safety devices. In other words, they urge (1) that the fact that they are so using the publicly built and maintained highways as their main place of business cannot be considered by any reasonable person as placing them in

a different category from those persons who merely use the highways for traverse; and (2) that even if constitutionally classifiable as different in kind from such persons, they cannot be subjected to the necessity of obtaining a certificate to carry on their highway transportation business.

The first postulate is quickly answered. If there be a logical or inherent distinction in kind the classification is sustainable. And we submit that the very statement of the point carries with it its own answer. *Of course there is a difference in kind* between the man who, as a mere incident to his business, transports his own property over the highways, and the man who makes of those highways the main instrumentality of his hauling business. Indeed, the distinction is much like that between the merchant whose store abuts upon the public sidewalk and the itinerant vendor or peddler, who uses that sidewalk as the situs of his business. No question as to common carriage or public utility status is raised there, and the Courts have always recognized the logical distinction there plainly to be seen, the vendor who uses the public streets being everywhere subject to special and distinct regulation.¹ We respectfully submit that the distinction is equally clear in the present instance. It is not a question of status as a common carrier, but of making use of the public highways for private hauling business.

As the State Court said in this very case, no person can be said to have a vested right to make use of the

(1) See, for example, *Ex parte Crowder*, 171 Fed. 250 (1909); *In re Gilstrap*, 171 Cal. 108 (1915), and *Ex parte Hogg*, 70 Tex. Crim. 161, 156 S. W. 931.

public highways as the situs of his business. That is a privilege to which "no one is entitled as of right". We respectfully call to this Court's attention the numerous decisions cited upon this point in the decision of the Court below (Tr. p. 79), and in particular to the apt language of Mr. Justice Sutherland in the case of *Packard v. Banton*, 264 U. S. 140; 68 L. ed. 596 (1923) in which it was declared that

"The streets belong to the public, and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary, and generally, at least, may be prohibited or conditioned as the legislature may see fit."

We submit that this reasoning of this tribunal coincides precisely with that of the State Court in the present instance. As that Court said, this is a conditional offer of an unusual privilege,—i. e., the privilege of using the public highways in a "special and extraordinary" manner as the main situs of business,—and, as such, any persons desiring to avail themselves of this privilege must submit to the condition.

The development of modern paved highways—itsself the result of the automobile—has within a generation opened up a field of business hitherto non-existent. In the interest of the public at large, which at enormous expense builds and maintains these highways, it has been found essential to impose regulations upon those who use these new instrumentalities of communication. First came the licensing of automobiles and their operators, and the enactment of general safety and weight provisions. These acts have been

broadly sustained in every State. But as the use of the automobile developed—as the life of whole communities was transformed by this new mode of locomotion which has made its way by its very elasticity and economy into every hamlet—as the network of broad, well built highways (unknown and unnecessary in the days of the horse and buggy) rapidly extended itself from town to town and far out into the farming areas—as these new factors came into being, there grew up a new and potent form of business,—the transportation of persons and property by automobile over these highways. The first result of this development was that most of the short line steam and electric railroads of the country went into bankruptcy. The second was that an insistent demand arose for some regulation of this new form of business.

In California this demand was so strong that, against the strenuous opposition of the State Railroad Commission, the California Supreme Court, upon petition by the short line railroads of the State, directed and ordered the Commission to assume jurisdiction over automotive carriers under a provision of the State Constitution adopted a quarter of a century before automobiles were invented.² The next year, again at the behest of the short line railroads, the Legislature passed a comprehensive statute providing for the regulation of “transportation companies” by automobile, including in that term all

(2) *Western Association of Short Line RRs. v. Railroad Commission*, 1916, 173 Cal. 802; 162 Pac. 391:

The constitutional provision in question had originally been adopted in 1879, and gave to the Railroad Commission certain regulatory authority over “railroads and other transportation companies”, which latter term the State Court held to include automobile carriers.

common carriers of persons or property between fixed termini or over regular routes. This regulation of automotive and common carriers was broadly sustained by the State Supreme Court as a proper exercise of the State's underlying and fundamental sovereign authority (commonly termed the "police power") upon the theory that it was a proper regulation of private acts and conduct in the interest of the general public good, the Court saying:

"The primary purpose of the legislature in enacting this statute was not to confer a franchise upon the operating companies but to give into the power of the commission for regulation and control in the interest of the public the operation of auto stages for transportation."³

In their petition for rehearing before the State Court herein, plaintiffs aptly said that with the progress of time,

"Steam railroads began to be constructed and attempted to construct their tracks on, along and across the public highways. Then came street railroads, first drawn by horses and later propelled by electricity, and then came interurban electric railroads. In order to take care of these situations and to protect the public in the use of the highways, there was established, as an exception to the general rule, the proposition that as to common carriers, the State might prevent the use of the public highways or, if it was willing that they should be used by such common carriers, it might establish such reasonable conditions as might be in the public interest."

(3) *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573 (at p. 585). See also *Coast Truck Line v. Railroad Commission*, 191 Cal. 257.

To which we added in our answer to the petition:

“With the further progress of time, however, automobiles and motor trucks came into use and their operators began to utilize the public highways as the main agency both of common carriage and of private business. It thus became necessary to protect the public interest further by extending the exception to the general rule so as to include, in addition to common carriers, all those who utilize the public highways as the main instrumentality for their private gain.”

The Chapter was, therefore, incomplete, and in 1919, the California Legislature, realizing that its former Act was inadequate in scope, and that the public interest demanded such further action to bring under reasonable regulation the increasing number of persons who had not held themselves out as common carriers but who nevertheless were using the public highways as the main situs,—indeed as the only situs of *their business of hauling for hire*,—amended the statute which had formerly covered common carriers alone to bring such private carriers under regulation. And this was done in aid of the commonweal—in order that all who use these public highways as a business for hire between fixed termini or over regular routes might be subjected to a proper public control, not for the purpose of suppressing competition but for the purpose of upholding the public interest in proper and continuous service, and the proper exercise of the special privilege of using the public highways as a place of business.

This whole claim of “private contract” rights is illusory. In the present instance there was but one

such contract, but in the *Holmes* case, the decision in which is appended to plaintiff's brief, there were twenty-three, and we suppose that under plaintiff's theory there might well be a thousand—the camouflage being thus indefinitely maintained. Somewhere, somehow there must, in any event, be an end to this play of "private contracts", and whatever may be determined as to this one-contract hauler, we respectfully call to the Court's attention the necessity of avoiding any protection to mere subterfuge, resorted to in order to escape proper public regulation. The *Holmes* case, we submit, clearly points to the danger to public control which is involved in this matter.

IV.

PLAINTIFFS' ALLEGED "AUTHORITIES".

Plaintiffs admit this case to be one of first impression, but—strangely enough—add that the California Court's decision is mostly "argument", and then proceed to cite a number of cases from other States which they urge as determinative of the very point herein involved. Were it not for this suggestion as to these cases we would be disposed to omit mention of them here, but we feel that in justice to the Court we should briefly point out that in none of them was there decided the question here presented.

In the *Duke Cartage* case (*Michigan Public Utilities Commission v. Duke*, 266 U. S. 570), no question arose as to the regulation of private contract haulage business. As was clearly pointed out by the California Supreme Court in the decision here under appeal,

the State of Michigan attempted in that case to place this hauler, as well as other contract haulers, in the category of common carriers, an attempt which we freely admit to be unlawful. That the State of Michigan rested its argument upon its alleged right to force such carriers to become common carriers, is shown in the quotation included on page thirty-six of plaintiffs' brief herein, wherein it is shown that the attorney general of Michigan definitely argued that it was competent for the Legislature of a State to require such operators "*to do that business as common carriers*". There is no attempt in the present instance thus to force any one to dedicate his property to public use.

The case of *Davis v. Metcalf*, 1924 (131 Wash. 141; 229 Pac. 2) is of no greater authority for the position here taken by plaintiffs in error, nor did that decision overrule the cases of *State v. Price*, 210 Pac. 787, and *Davis v. Nickell*, 218 Pac. 198, which definitely upheld the position now taken by the California Supreme Court. We have no quarrel with the statement of the Washington Court quoted in plaintiffs' brief at page forty-one, to the effect that the Court should be slow to hold that the State could exclude the owners of property from carrying it over the highways "either personally, or by agent, or by an independent contract", but this statement bears no relation to the argument of plaintiffs in the present case. It refers to a prohibition placed on the owner of goods,—it has nothing to do with the right of the State to control and regulate the *business* of one who holds himself out as a contract carrier of property by automobile

truck over the highways of the State for others. It is the use of the highways as the chief—and indeed the only—source of business which gives to the State the authority to regulate such carriage, and it should, moreover, be pointed out that in the California statute the intent of the Legislature to regulate this type of transportation is much clearer and more definite than that of the Washington statute (cited on page forty of plaintiffs' brief), and although that statute is admittedly broad enough to allow an interpretation including private as well as common carriers within the definition of an "auto transportation company", it would not have been at all surprising had the Washington Court not done so.

The Utah decision of *State v. Nelson*, 238 Pac. 237, (cited and discussed in plaintiffs' brief beginning at page forty-three), involves the consideration of a statute which, like that of Michigan, attempted to force private contract carriers to become common carriers over the highways, and as shown on page forty-five of plaintiffs' brief, the Utah Court construed that statute as applicable only to common carriers, stating that which we all admit, to-wit: that the State cannot by mere legislative fiat or edict, or by regulating orders of a Commission, "convert mere private contracts of a mere private business into a public utility or make its owner a common carrier". It is quite evident that, in the opinion of the Utah Supreme Court, the attempt of the Legislature of that State was not to impose regulations upon those carriers as private contract carriers over the highways, but

to force them by legislative fiat to become common carriers.

The Ohio statute referred to in the case of *Wissem v. Brown*, et al., 112 Ohio State 59; 146 N. E. 808, is of like import. Section 6142 of the Ohio General Code provides that any persons engaged in the business of carrying or transporting persons or property in both

"in motor propelled vehicles of any kind whatsoever, for hire upon any public street, road or highway in this State . . . is a motor transportation company, and as such is declared to be a common carrier".

No further comment is necessary upon the Ohio decision.

It becomes apparent, therefore, that the statutes of the other States from which plaintiffs cite the above mentioned "authorities" are all much narrower in their scope than is the California statute, and that all of them attempt by mere legislative decree to compel common carriage. This is not true in the California statute, and we again call to the attention of the Court the fact, admitted by plaintiffs, that this is in truth a case of first impression.

In conclusion, we wish to urge the necessity for this tribunal to recognize here, as in other forms of action, the importance of an elastic and expansive development of the law to meet new and changing conditions. As to this we can hardly do better than to quote from another recent decision of the California Court which in our opinion excellently expresses this fundamental

We respectfully submit that the regulatory measures prescribed in the California Auto Stage and Truck Transportation Act cannot be said to be unreasonable or arbitrary, and we urge that this is particularly true of the requirement of a certificate before commencing operations. When the magnitude of the problem of present and future regulation of motor transportation to the various States is borne in mind, we believe that the wisdom as well as the lawfulness of this action on the part of the State will be apparent. Regulation of all carriers for hire over the public highways, both common carriers and private carriers, has become imperative in the various States, and the indispensability of such regulation is becoming more and more accentuated with the rapid growth of this relatively new method of transportation.

We have not overlooked a certain tendency on the part of this Honorable Tribunal to call a halt upon over-regulation by the States, and the present defendant has not found itself without considerable sympathy with this tendency. We desire, however, to call to the Court's attention the fact that this tendency has been apparent largely in cases arising under the Commerce Clause (as in the *Duke* case, supra, and the *Huck* case, 367 U. S. 347, 69 L. ed. 623), rather than in cases involving the purely general complaints under the due process and equal protection where interstate affairs alone were in question.

This Court, we submit, should be slow, indeed, to hold invalid upon such grounds as those urged by these plaintiffs, the studied and deliberate action of a State, supported by the careful and well considered

determination of that State's Supreme Court that such action is in the public interest. Every intentment should be in favor of the statute.

And this is particularly true in the present case in which, as we have pointed out above, a decision adverse to that of the State Court would be tantamount to a reversal of the attitude announced by this Court in the case of *Packard v. Banton*, supra, in which the fundamental doctrine of the right of a State to control the use of its public highways for private gain was so clearly and succinctly declared.

Dated, San Francisco,

April 3, 1926.

Respectfully submitted,

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